SUPREME COURT, U. S.

No. 1176

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

LIGGETT & MYERS TOBACCO COMPANY,
Petitioner,
v.
ANITA PRITCHARD, Administratrix of the Estate of OTTO E. PRITCHARD, Deceased,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Although petitioner asserts that the court below "acted beyond its power and jurisdiction" in amending its mandate and opinion in this case (Pet. 19), it cites no statute or rule so limiting the jurisdiction of the courts of appeals. And although petitioner asserts a conflict with decisions of other courts of appeals (Pet. 19, 24), it cites no case denying that a court of appeals has such power but only cases in which particular courts of appeals refused to exercise their power. That the power exists is clear.

> In spite of the ending of the term at which our mandate went down, we have power over our mandate, not only to declare what we meant, but to change it as we think the situation demands.

National Comics Publications, Inc. v. Fawcett Publications, Inc., 198 F.2d 927 (2d Cir. 1952). The actions of this Court in such cases as *Cahill v. New York, N. H. & H. R. Co.*, 351 U.S. 183 (1956), and *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965), are authority enough for the action of the court below.

This was an appropriate case in which to exercise the power, for the parties and the trial court should not be left in doubt as to the scope of the new trial the appellate court had ordered. Although petitioner announces repeatedly that the original mandate was "clear and unambiguous" (Pet. 19, 23), and that it "clearly meant a full new trial" (Pet. 20; cf. 8), only Humpty Dumpty can make a thing so by saying it three times. That the court of appeals intended a complete new trial was not clear to the trial judge, who asked for a memorandum on the question (Pet. 9). It was not clear to the respondent, who moved for clarification of the mandate. And it was not clear to the court of appeals, which, on respondent's motion, made it clear that it did not intend to have the issue of causation retried. Some years ago the Second Circuit in an opinion spoke several times of a "new trial" and remanded for "a new trial on the valuation of the condemned property." The trial judge construed this as not requiring a complete new trial on valuation, but only reopening of the record for introduction of evidence held to have been erroneously excluded. On a second appeal the Second Circuit, in a per curiam opinion by Chief Judge Charles E. Clark, held that the trial court had properly construed the mandate, and that "this interpretation was obviously in harmony with considerations of expedition

and of economy in judicial administration." *United States v. 63.04 Acres of Land,* 257 F.2d 68, 69 (2d Cir. 1958).

Finally petitioner contends that it is unconstitutional to order a new trial on less than all the elements of a theory of liability. For this proposition it cites (Pet. 13-14) two cases in which, in particular circumstances, courts of appeals have refused to order a partial new trial, though they have not held that it would be unconstitutional so to do. Petitioner does not cite *Furr v. Herzmark,* 206 F.2d 468, 472 (D.C.Cir. 1953), in which the court, while recognizing that "in a sense the issue in the end is the single one of negligence," ordered a new trial as to certain aspects in which defendant was claimed to have been negligent but not as to others. Nor does petitioner cite *Mazer v. Lipschutz,* 327 F.2d 42, 52 (3rd Cir. 1964), in which a new trial was ordered on the vicarious liability of defendant, though the jury's finding that he was not individually liable was allowed to stand, or *Gallo v. Crocker,* 321 F.2d 876 (5th Cir. 1963), where a new trial was limited to the single issue of whether two defendants were jointly liable. Finally petitioner makes only a glancing reference (Pet. 18) to *Green v. American Tobacco Co.,* 325 F.2d 673, 678 (5th Cir. 1963), a case strikingly similar to the present case. There a new trial was ordered on the warranty issue, but it was held that the parties were bound by the determination of the first jury on special interrogatories that defendant's cigarettes were the cause of plaintiff's lung cancer. This limitation of the new trial was attacked by the manufacturer on petition for certiorari,

but this Court refused to review the case. 377 U.S. 943 (1964). Review should also be refused in this case.

Respectfully submitted,

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REPLY

BRIEF

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's (plaintiff's) brief in opposition was served on counsel for petitioner (defendant) on April 6, 1967. Thus, this reply brief is timely.

Plaintiff's brief in opposition completely ignores a central issue raised by defendant's petition—does the truncated retrial now ordered by the Third Circuit's amended judgment and mandate deprive defendant of a fair trial as guaranteed by the Seventh Amendment. Plaintiff neither cites nor discusses the standards of fairness to be applied to retrials as stated by this Court in *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494 (1931). Neither the Third Circuit below nor the Fifth Circuit in *Green v. American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964) dis-

cussed or applied these standards. We submit that, under the standards of *Gasoline Products*, defendant has been denied a fair trial.

A central issue raised by this petition is one of fairness. A reading of the record of the second trial establishes that plaintiff had a full and fair trial before a jury. Nevertheless, the Third Circuit reversed a verdict for defendant based on special jury findings because of alleged error in the charge. Plaintiff made no objection to the charge in the trial court or even on appeal. Disregarding Rule 51 of the Federal Rules of Civil Procedure, the Third Circuit, on its own initiative, unearthed error in the charge and reversed. Defendant's verdict was negated on grounds which defendant never had an opportunity to brief or argue. Furthermore, the Third Circuit held that there was insufficient evidence to support the jury finding of assumption of risk, despite the fact that plaintiff had never moved for a directed verdict pursuant to Rule 50 (b), a mandatory prerequisite for raising sufficiency of evidence on appeal. Then, seventeen months after it had ordered a retrial of the express warranty count, the Third Circuit, again on its own initiative, amended its previous judgment and ordered a partial retrial in which the prior jury's finding on causation, the only finding adverse to defendant, is to stand but the other findings on express warranty must be retried.

This Court should grant certiorari to afford fair treatment to this corporate defendant and require the Third Circuit to apply, with an even hand, the procedural and substantive fairness which is expected in federal

trials. The two Supreme Court cases cited by plaintiff to support the action of the court of appeals in fact support defendant's argument. In *Cahill v. New York, N.H. & H.R.R. Co.*, 351 U.S. 183 (1956) and *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965), this Court acted to achieve fairness. Defendant seeks the same result.

Ignoring the fundamental issue of fairness, plaintiff's brief in opposition seems to make three points. First, a court of appeals may amend its judgment at any time and for any reason or for no express reason—as the Third Circuit did in this case. Second, this was an appropriate case to amend the judgment because the original judgment was not clear. Third, partial trials have been ordered on less than all the elements of a theory of liability. All three of these points are completely devoid of merit.

Final judgments of courts of appeals cannot be altered and amended at the whim of those courts. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944). As far as one can tell from the amended opinion and judgment, the Third Circuit gave no consideration to whether or not a partial retrial would be fair to defendant and did not attempt to apply the standards of *Gasoline Products*. Plaintiff seeks to justify the amendment by relying on broad language in *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 198 F.2d 927 (2d Cir. 1952) which is pure *dictum*. There, the Second Circuit did not amend its judgment but merely clarified language it had used in its opinion, hardly the situation here. Even this Court will only

amend its judgments in unusual cases and then only to avoid manifest injustice.

Plaintiff misstates defendant's position. Defendant did not say that no court ever has the right to amend its judgment at a later date, but rather made it quite clear that, *in the circumstances of this case,* the Third Circuit lacked the power and jurisdiction to amend its judgment. (Pet. 19, et. seq.).

Plaintiff also is mistaken in its claim that this was an appropriate case for amendment because the scope of the new trial was left in doubt by the original judgment and mandate. The scope of the new trial was clear to everyone. At the pretrial conference on June 24, 1966, Judge Miller stated that the mandate for "a new trial" meant to him a full new trial. As a matter of courtesy he extended to plaintiff the opportunity to submit a memorandum. No transcript of this pretrial conference was taken, but as attorneys for defendant, we represent that the foregoing is an accurate statement of what occurred. Plaintiff also seems to have been aware of the meaning of the original mandate since he failed to submit the issue to Judge Miller, but instead sought relief in the court of appeals. The court of appeals also understood that its original mandate required a full new trial because it explicitly stated in its amended opinion that the prior mandate required no clarification but "must be amended". (A 56).

The case of *United States v. 63.04 Acres of Land,* 257 F.2d 68 (2d Cir. 1958) is irrelevant since it was tried by a judge without a jury and was remanded to

the same judge to consider additional evidence. There the same trier of fact considered all the evidence in arriving at a decision. Here, there will be a different jury which will not be allowed to hear all the relevant evidence on the issues which they must decide.

None of the cases cited on page 3 of the brief in opposition negates defendant's argument that a single theory of liability should not be retried on less than all the elements of that theory (Pet. 13). In *Furr v. Herzmark,* 206 F.2d 468 (D.C. Cir. 1953), the court of appeals merely held that on certain allegations of negligence there was insufficient evidence to go to the jury. On those allegations for which there was sufficient evidence, all the elements of a cause of action for negligence were retried, including causation. Similarly, in *Mazer v. Lipschutz,* 327 F.2d 42 (3rd Cir. 1964), *cert. denied,* 385 U.S. 833 (1964) and *Gallo v. Crocker,* 321 F.2d 876 (5th Cir. 1963), several distinct causes of action were involved and a new trial was ordered with regard to one cause of action (See Pet. 13).

Plaintiff also relies heavily on this Court's denial of certiorari in *Green.* Denial of certiorari, however, does not indicate approval or disapproval. Now that another court of appeals has reversed certain findings under Rule 49 while investing other findings with a finality unjustified by considerations of fairness or by the Federal Rules of Civil Procedure, this Court should consider whether the principles of *Gasoline Products* apply. (See Pet. 18-19).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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